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District Supreme Court, U.S.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ARTHUR A. COIA
ARTHUR E. COIA
ALBERT J. LEPORE and
JOSEPH J. VACCARO, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the RICO conspiracy crime created by 18 U.S.C. § 1962(d) requires proof of an overt act as an essential element of the offense?

2. Whether a judicial presumption that a conspiracy continues to exist until there has been an affirmative showing by the accused that it has terminated violates due process of law, the presumption of innocence, the burden of the prosecution to prove guilt beyond a reasonable doubt and the privilege against self-incrimination and conflicts in principle with the Supreme Court's decision in cases such as Mullaney v. Wilbur, 421 U.S. 684, 685 (1975)?

3. Whether a judicial presumption that a conspiracy itself continues to exist until there has been affirmative showing by the accused that it has terminated conflicts in principle with

the Supreme Court's decisions in Hyde v. United States, 225 U.S. 347, 367-72 (1912) and in United States v. Kissel, 218 U.S. 601, 607-08 (1910), which suggests a requirement of actual proof of "continuous co-operation" or continued "efforts in pursuance of the plan?"

4. Whether the bar of statutes of limitations such as 18 U.S.C. § 3282 prohibiting trial for an offense unless an indictment is found within a set period of time after the offense is "committed" can be circumvented by a judicial presumption that the crime continues although no evidence of it exists and no act is committed which manifests that a criminal agreement is at work?

5. Whether all federal courts should be bound by the modern, majority rule of criminal pleading which demands

that an accusation be dismissed when it does not allege facts on its face showing that the alleged criminal conduct is not barred by the statute of limitations?

6. Does a federal trial court have the power and discretion pretrial to inquire beyond the face of a criminal accusation in order to determine a statute of limitations question or must it wait through a lengthy trial before deciding that prosecution was barred in the first place?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The Petitioners, Arthur A. Coia, Arthur E. Coia, Albert J. Lepore, and Joseph J. Vaccaro, Jr., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 719 F.2d 1120 (11th Cir. 1983) and is reproduced at App. 129.

JURISDICTION

The opinion of the Court of Appeals was filed November 17, 1983, and a petition for rehearing was denied January 20, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

18 U.S.C. § 1954 provides as follows:

Whoever being--

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer of any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee or an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited

by this section, shall be fined not more than \$10,000 or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

18 U.S.C. § 1961 provides in pertinent part:

As used in this chapter --

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1954 (relating to unlawful welfare fund payments) . . .;

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of any prior act of racketeering activity;

18 U.S.C. § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) provides:

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 3282 provides:

Except as otherwise expressly provided, by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Rule 2 of the Federal Rules of Criminal Procedure provides:

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 12(a) of the Federal Rules of Criminal Procedure provides:

Pleadings and Motions.
Pleadings in criminal proceedings shall be the indictment

and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

Rule 12(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections

shall be noticed by the court at any time during the pendency of the proceedings);

Rule 17.1 of the Federal Rules of Criminal Procedure provides in pertinent part:

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial.

Rule 57(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

Procedure Not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

STATEMENT OF THE CASE

On September 23, 1981, a federal grand jury in the Southern District of Florida charged the four petitioners

and one other defendant in a one-count indictment, alleging that they had conspired to engage in labor racketeering, in violation of 18 U.S.C. 1962(d).^{*} Prior to the trial, the petitioners filed motions to dismiss the indictment, claiming in part that the indictment was not brought within the statute of limitations period. The magistrate recommended that the motion be granted, and after oral argument on the motion, the district court adopted the magistrate's recommendation and ordered the indictment dismissed as to all four petitioners. The government then took an appeal pursuant to the Criminal Appeals Act, 18 U.S.C. § 3731. A panel of the United States Court of Appeals for the Eleventh Circuit reversed. The four petitioners have joined in the

^{*}The fifth defendant was severed by the district court and is not a party to this appeal.

instant petition for a writ of certiorari seeking review of that decision.

STATEMENT OF THE FACTS

1. The Indictment.

The indictment in this case alleges that the five petitioners conspired to use their influence over the Laborers International Union of North America and its subordinate bodies and affiliated employee benefit plans in ways forbidden by 18 U.S.C. § 1954 (App. A-1)(1 R. 1-11).^{*} According to the indictment, the conspirators funneled the union's insurance and service business into insurance and service companies they had set up, and then charged the union members for the most expensive form of insurance. The conspirators then looted the insurance premiums and used the proceeds for kickbacks, payoffs, un-

^{*}"R." refers to the 11-volume record on appeal.

earned salaries and fees, and improper personal expenses (Indictment ¶4).

Part of the conspiracy, the indictment charges, was an agreement among conspirators to obtain kickbacks in return for giving the union's insurance business to one Joseph Hauser and companies controlled by him. In order to facilitate the payment of the kickbacks, the conspirators set up several companies to serve as "conduits" for the kickbacks. The Northeast Insurance Agency, Inc. (Northeast) was set up as a conduit for the payments of kickbacks from Hauser to petitioners Arthur A. Coia and Arthur E. Coia (father and son) and to petitioner Albert J. LePore (Indictment ¶11). National Group Insurance Agency, Inc. was set up as a conduit for the payment of kickbacks from Hauser to the severed defendant

and petitioner Joseph J. Vaccaro, Jr. (Indictment ¶10).

The indictment further alleges that the petitioner Arthur E. Coia agreed to provide Hauser with inside information regarding the awarding of insurance contracts with certain of the Union's employee benefit plans and to use his influence to ensure the award of those contracts to one of Hauser's companies (Indictment ¶12). Finally, the indictment charges that the petitioners agreed to support the kickback scheme (Indictment ¶14) and to take steps to hide and conceal the purpose of the conspiracy and the acts committed in furtherance of the conspiracy (Indictment ¶15).

The indictment alleges that the conspiracy continued from 1973 until "in or about December 1977" (Indictment ¶3). In addition, the indictment lists 28

overt acts allegedly committed by the conspirators between 1973 and October 19, 1976, in furtherance of the conspiracy. These overt acts include an initial meeting between petitioner Arthur E. Coia and Joseph Hauser in 1973 (Overt Act 1); Arthur E. Coia's receipt of periodic payments of approximately \$5000 between March 1974 and June 1976 (Overt Act 3); a meeting of petitioners Vaccaro, the severed defendant, and petitioner Arthur E. Coia with Hauser in 1974 (Overt Act 5); a meeting between petitioner LePore and Hauser in January 1976 (Overt Act 13); and the receipt of a \$50,000 payment from Hauser by petitioners LePore and Arthur A. Coia in February 1976 (Overt Act 14). The indictment also alleges that during 1976, various petitioners took steps designed to further the conspiracy by directing insurance business to Hauser's

companies and by receiving substantial payments directly or indirectly from Hauser (Overt Acts 16-25). Overt Act 28, the last overt act listed in the indictment, charges that on October 19, 1976, petitioner LaPore wrote a check for \$2000 to himself out of funds provided in part by Hauser (Overt Act 28). The date of that overt act, which is alleged to have been committed in furtherance of the conspiracy, fell within the five-year period preceding the return of the indictment.

2. The Magistrate's Report.

Prior to trial, the petitioners moved to dismiss the indictment on various grounds, including the statute of limitations (2 R. 226; 3 R. 278; 5 R. 790-803; 8 R. 1363-1372, 1400-1409). After the government responded (7 R. 1128-1137), the district court referred the motion to a magistrate for a report.

In a six-page report, the magistrate recommended that the indictment be dismissed (App. A-27)(8 R. 1316-1321).

The magistrate first concluded that a RICO conspiracy charge requires the government to prove an overt act in furtherance of the conspiracy, although the statute does not expressly refer to any overt act requirement (8 R. 1317). The magistrate then ruled that because the statute requires proof of an overt act, the indictment must allege an overt act within the statute of limitations period in order to survive a motion to dismiss on statute of limitations grounds (8 R. 1318). Because Overt Act 28 is the only overt act alleged in the indictment that clearly falls within the limitation period, the magistrate then addressed the question whether the allegations in Overt Act 28 are sufficient to withstand the petitioner's

motions to dismiss on statute of limitations grounds.

Overt Act 28, the magistrate noted, alleges that on or about October 19, 1976, petitioner LePore "wrote a check for \$2,000 to himself out of funds provided in part by Joseph Hauser." The magistrate concluded that this act could not be in furtherance of the conspiracy charged in the indictment because it appeared simply to consist of a transfer by LePore of funds that had previously been provided to LePore by Hauser (8 R. 1318-1319). If the purpose of the conspiracy was to obtain money for the petitioners by means of kickbacks from Hauser, the magistrate ruled, "it would seem that the purpose of the conspiracy was complete upon delivery by Hauser of money to the possession or control of LePore. What LePore thereafter did with the funds could not be in furtherance of

the goals of the conspiracy but rather a use of the fruits of the conspiracy" (8 R. 1319). The magistrate therefore recommended that the motion to dismiss the indictment be granted (8 R. 1321).

3. The District Court's Ruling.

The government objected to the magistrate's report and sought a hearing before the district court. At the hearing, and in pleadings submitted to the district court, the government made a three-part argument: (1) that the statute of limitations issue was not appropriate for a pre-trial resolution; (2) that because the RICO statute does not require proof of an overt act, the statute of limitations would be satisfied if the proof showed that the conspiracy continued into the limitations period, even if no overt act were committed during that period; and (3) that even if the RICO statute were

construed to require proof of an overt act, Overt Act 28 in the indictment would be sufficient to bring the indictment within the statute of limitations period (11 R. 4-28).

The government represented at the hearing that the proof would show that the conspirators continued to plan ongoing kickbacks, as part of the original agreement, until well into the limitations period (11 R. 21). Moreover, the government argued that the proof at trial would show that Overt Act 28 was clearly in furtherance of the conspiracy. In particular, the government represented that the proof would show that the account from which petitioner LePore withdrew \$2000 for his personal use was one of the "conduit" accounts for transferring money from Hauser to the petitioners (11 R. 24-26). Therefore, the government argued, the

transfer of funds from that account to LePore furthered the conspiracy by disguising the kickback scheme and by serving as a vehicle for distributing the fruits of the conspiracy. The indictment, however, alleged that Northeast served as a conduit for kickbacks (§1(f) and 11) and, in contradistinction, failed to allege that LePore's own account served as any kind of conduit. Petitioners further introduced evidence to this effect, without objection by the government, showing that the account was an attorney-at-law account and that any funds from Hauser or Northeast had been depleted before LePore wrote the \$2000 check to himself.

Following the hearing, the district court entered an order dismissing the indictment (App. A-118)(8 R. 1331-1334). The court agreed with the magistrate that a RICO conspiracy charge

requires proof of an overt act (8 R. 1333). The court then concluded that "the writing of a check by one defendant from his personal account did not advance the purpose of the conspiracy alleged in this case" (8 R. 1333). The act, the court concluded, was not a step in furtherance of the conspiracy, but was merely the use of the fruits of the conspiracy, which is not sufficient to extend the conspirational period (8 R. 1333). The government filed a timely notice of appeal from that order (8 R. 1335).

4. The Court of Appeals' Opinion.

A panel of the United States Court of Appeals for the Eleventh Circuit reversed. (App. 129) 719 F.2d 1120. The majority first stated that the district court did not err in resolving prior to trial the factual issue of whether the conspiracy continued into

the statute of limitations period as alleged in the indictment. Indeed, it twice stated that a pretrial determination was "mandated" by the Federal Rules of Criminal Procedure. 719 F.2d at 1123. Yet, it appeared to limit this determination to review of the facts alleged on the face of the indictment and virtual acceptance of conclusory allegations. 719 F.2d at 1123, 1124. It practically precluded any pretrial evidentiary hearing designed to resolve the statute of limitations problem before completion of the five week jury trial estimated by the prosecution as necessary for its case-in-chief. 719 F.2d at 1125.

Second, the majority held the RICO conspiracy crime created by 18 U.S.C. §1962(d) does not require proof of an overt act as an essential element of the offense. It thus reversed the district

court's dismissal of the indictment because "it was based on an erroneous notion of substantive law." 719 F.2d at 1123; id. at 1125.

Third, the majority stated that a conspiracy which does not require proof of an overt act as an essential element is "deemed to continue as long as its purposes have neither been abandoned nor accomplished," 719 F.2d at 1124, and that such a conspiracy which "'contemplates a continuity of purpose and a continued performance of acts, . . . is presumed to exist until there has been an affirmative showing that it has terminated.'" Thus, the majority reasoned that an indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged, in conclusory fashion, to have continued into the limitations period. 719 F.2d at 1124.

The majority also opined that it doubted the district court could ever hold that the case was time barred. It said that an indictment alleging facts occurring beyond the time period of the statute of limitations but close to that bar "could support an inference that the conspiracy continued into the limitations period." 719 F.2d at 1125. It also referred to the presumption of continued existence. Id. And, it cautioned that "the district court should not require the government to launder its evidence in the presence of the defendant prior to trial." Id.

One judge concurred in everything the majority said but dissented on grounds that the court was bound by the contrary holding in United States v. Phillips, 664 F.2d 971, 1038 (5th Cir. Unit B 1981), cert. denied, 457 U.S. 1136 (1982), which requires proof of an overt act as an essential element of RICO conspiracy.

A timely petition for rehearing and suggestion for rehearing en banc was filed. No judge requested a poll of the circuit judges concerning en banc rehearing. The petition was denied without a statement of reasons. (App. A-148).

REASONS FOR GRANTING THE WRIT

This case presents important, recurring questions of federal law. Federal prosecutors almost automatically add conspiracy charges to accusations alleging federal substantive crimes. RICO charges are often added where formerly other conspiracy charges alone served to enhance the accusation. See generally Tarlow, RICO: The New Darling of the Prosecutor's Nursery, 49 Fordham L. Rev. 165 (1980); Tarlow, RICO Revisited, 17 Ga. L. Rev. 291 (1983). The decision rendered below thus has important practical consequences.

Moreover, the decision below decides federal questions in a way in conflict with applicable decisions of this Court. The federal courts of appeal are also in conflict with one another. In addition, federal criminal pleading practice concerning statutes of limitations appears to be in conflict with the majority rule, reflected in state court practice.

The court below has sanctioned a rule of law in which the existence of a crime is presumed without any evidence manifesting that any act has been committed. It has used this rule of law to subvert the "policy of repose" established by the Congress in statutes of limitations -- a policy this Court has recognized as "fundamental to our society and our criminal law." Bridges v. United States, 346 U.S. 209, 215-16 (1953). Finally, it has combined this

rule of law with an approach to pleading and practice which requires federal courts to engage in lengthy trials before coming to grips with statute of limitations problems -- even though it appears probable that the prosecution should be barred at the threshold by the statute of limitations. Thus, the decision below lost sight of important precedents of this Court, due process of law, the policy of repose and the importance of judicial economy. Certiorari should be granted for this reason and to resolve the confusion which abounds in the areas outlined more fully below.

I.

CERTIORARI SHOULD BE GRANTED
TO RESOLVE THE CONFLICT IN THE
CIRCUITS OVER THE OVERT ACT
REQUIREMENT FOR A RICO CON-
SPIRACY CHARGE

In reversing the district court's dismissal of the indictment, the court

of appeals held that a RICO conspiracy does not require an overt act and, consequently, overt acts are irrelevant in applying the statute of limitations to RICO cases. The court thus refused to follow several Fifth Circuit RICO cases, ordinarily binding authority in the Eleventh Circuit, indicating that proof of an overt act was required for conviction under 18 U.S.C. § 1962(d). United States v. Phillips, 664 F.2d 971, 1038 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); United States v. Sutherland, 656 F.2d 1181, 1186-87 n.4 (5th Cir. 1981); cf. United States v. Elliot, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

RICO is an extraordinarily broad and far-reaching act whose language has been described as "less than pellucid." United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), vacated, 439 U.S. 810

(1978), rev'd. in part on other grounds, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979). In fact, the statute has frequently been attacked as unconstitutionally vague. See, e.g., United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); United States v. Parness, 503 F.2d 430, 440-42 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Much of the confusion surrounding RICO concerns whether a conspiracy charge requires the showing of one or more overt acts done in furtherance of the conspiracy. It is our contention that it does.

While it is true that it is the agreement that is the gravamen of a conspiracy offense, nevertheless it is "conduct, not status" that is punished.

Elliot, 571 F.2d at 903. To be convicted as a member of a RICO conspiracy, "an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes." Id. (emphasis in original.) Such an agreement is best "objectively manifested" by proof of overt acts done in furtherance of that agreement. Without a requirement of objective proof of a conspiracy to temper a statute as broad and complex as RICO, which covers crimes from mail fraud to murder, the potential for abuse is far too great.

The overt act requirement has produced substantial confusion and conflict among the circuit courts. At least four circuits have endorsed a requirement of one or more overt acts by

one or all of the conspirators; at least three circuits have rejected this view.

The Fourth Circuit, for example, decided that "§ 1962(d) . . . requires two racketeering activities . . . at least two predicate offenses to establish a conspiracy." United States v. Karas, 624 F.2d 500, 503 (4th Cir. 1980), cert. denied, 449 U.S. 1978 (1981). Similarly, the Fifth Circuit, only a month before the Coia decision, affirmed the overt act requirement in that circuit, relying upon the same authority Coia declined to follow: "There must be proof of an illegal conspiracy, defendants' knowing participation and an overt act in furtherance." United States v. Kimble, 719 F.2d 1253, 1256 (5th Cir. 1983) (citing United States v. Phillips, 664 F.2d 971 (5th Cir. 1981). See also United

States v. Starnes, 644 F.2d 673 (7th Cir. 1980), cert. denied, 454 U.S. 826 (1981) (rejecting defendants' argument that the predicate acts upon which their RICO conspiracy conviction was based constituted only one predicate act, rather than the two required by the statute); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050, reh'g denied, 424 U.S. 950 (1976) (for RICO conspiracy conviction, government must prove that conspiracy was formed for the purpose of conducting an enterprise "through a pattern of racketeering" which, by definition, requires "at least two acts of racketeering activity.").

As noted above, the overt act requirement has also been rejected in some circuits. For example, in United States v. Barton, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857

(1981), the court stated: "While the general conspiracy statute requires proof of an overt act, the RICO conspiracy section does not." The Eleventh Circuit, of course, has now aligned itself with this view with its decision in this case. See also United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 103 S.Ct. 1249 (1983) (rejecting contention that each conspirator must commit two or more crimes, but holding that at a minimum, indictment must charge agreement by each conspirator to commit two or more specified crimes.)

Some courts, such as the Eighth Circuit, have simply refused to decide the issue:

The RICO statute admittedly does not make clear whether each RICO conspiracy defendant must agree that someone in the enterprise will commit two predicate acts, whether each must agree personally

to commit two such acts, or whether each member must actually commit two such acts. . . . Regardless of the answer to this question, we here find that each appellant did in fact agree personally to commit two such acts and did commit two acts of racketeering

United States v. Lemm, 680 F.2d 1193, 1203 n.11 (8th Cir. 1982), cert. denied, 103 S.Ct. 739 (1983).

Considerations of practical and equitable administration of justice demand that the conflict among the circuits over whether a RICO conspiracy charge requires a showing of overt acts must be resolved. Considerations of fundamental fairness and due process of law demand that the requirement be upheld. For these reasons we urge the Court to grant certiorari to consider and decide this pressing issue.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' PRESUMPTION OF A CONTINUING CONSPIRACY MISINTERPRETS FEDERAL LAW AND CONFLICTS IN PRINCIPLE WITH SUPREME COURT DECISIONS REGARDING PRESUMPTION OF INNOCENCE, ALLOCATION OF BURDEN OF PROOF AND DUE PROCESS OF LAW

The district court, upon motion by petitioners, dismissed the indictment as barred by the statute of limitations, there being no overt act committed in furtherance of the conspiracy during the five year statutory period prior to the indictment. The court of appeals reinstated the indictment, noting that the indictment alleged that the conspiracy continued into the limitations period, that the grand jury had found probable cause to issue the indictment, and, critically, that "a [continuing] conspiracy . . . is presumed to exist until there has been an affirmative

showing that it has terminated." United States v. Coia, 719 F.2d 1120, 1125 (11th Cir. 1983) (quoting United States v. Mayes, 512 F.2d 637, 642 (6th Cir.) cert. denied, 422 U.S. 1008 (1975)). Earlier the court below declared "[t]he conspiracy may be deemed to continue so long as its purposes have neither been abandoned nor accomplished." 719 F.2d at 1124.

This judicial presumption conflicts with basic notions of due process as interpreted by this Court and is founded not upon solid law, but upon a long-standing misinterpretation of a Supreme Court case.

Due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364 (1970); Mullaney v. Wilbur, 421 U.S. 684, 685 (1975);

Patterson v. New York, 432 U.S. 197 (1977); Sandstrom v. Montana, 442 U.S. 510 (1979). The government must, in order to convict, prove beyond a reasonable doubt that the alleged conspiracy continued into the five-year period preceding the indictment. Yet the government has alleged no overt acts within this period* and in fact, at a pre-trial hearing, the government was unable to proffer any action by an accused which manifested that the conspiracy still existed within the time period of the statute of limitations. Instead, the government relies upon the bald allegation of a continuing conspiracy and upon the unconstitutional presumption that a conspiracy continues

*One overt act alleged in the indictment (overt act No. 28) fell within the statute of limitations period, but was insufficient on its face to satisfy the requirement that it be in furtherance of the conspiracy. United States v. Coia, 719 F.2d at 1122.

until there has been an affirmative showing by the accused that it has terminated.

In considering the validity of statutory presumptions, this Court has held that there must be "a rational connection between the facts proved and the facts presumed." Leary v. United States, 395 U.S. 6, 33 (1969); Tot v. United States, 319 U.S. 463, 467 (1943). The process of determining rationality "is, by its nature, highly empirical." United States v. Gainey, 380 U.S. 63, 67 (1965). The judicially created presumption imposed by the court of appeals in this case is neither logically sound nor empirically justified. There is simply no foundation, logical or empirical, for the contention that a conspiracy that exists today must be presumed to exist one year from today, one month from today, or even tomorrow. Just as the

creation of a conspiracy cannot, consistent with due process, be presumed without proof, so too is the presumption that a conspiracy once created necessarily continues until the accused shows that it has been terminated a violation of the accused's right to due process of law.

The Court's presumption of a continuing conspiracy is not only constitutionally infirm, but is based on suspect authority as well. An examination of the circuit court's chain of authority for the presumption that a conspiracy continues until there is an affirmative showing that it has been terminated reveals that the idea has evolved from Hyde v. United States, 225 U.S. 347 (1912).^{*} But the language

^{*}The court cites United States v. Mayes, 512 F.2d 637, 642 (6th Cir.), cert. denied, 422 U.S. 1008 (1975), which relies on United States v. Etheridge, 424 F.2d 951, 964 (1970). Etheridge cites Hyde, along with five other cases which also rely on Hyde.

and holding of Hyde have been greatly distorted and misconstrued over the years.

In Hyde, the Court considered the problem of proving membership in a conspiracy that involved not one agreement, but a continuous series of agreements. That a conspiracy could be treated as continuous was decided by United States v. Kissel, 218 U.S. 601 (1910), but that opinion had "nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be." 218 U.S. at 610.

Nor did Hyde speak to the degree of proof necessary to show that a conspiracy is a continuing one. The evidence of a continuing conspiracy in Hyde was clearly sufficient -- overt acts committed within the statute

of limitations period. One of the conspirators contended, however, that since none of the acts attributed to him had occurred within the three-year period, the statute of limitations barred his conviction. The Court disagreed, holding that if a conspiracy is a continuing one, the relation of the conspirators to it must continue as well, unless a conspirator has withdrawn.

If there is any presumption arising from Hyde, it is that a proven member of a proven continuing conspiracy is presumed to remain a member of that conspiracy until its termination, or until his withdrawal. But over the years this holding has been distorted to variations on the same catchphrase: "a conspiracy once established is presumed to continue until the contrary is established." Coates v. United

States, 59 F.2d 173, 174 (9th Cir. 1932); Accord Marino v. United States, 91 F.2d 691, 695 (9th Cir. 1937); United States v. Etheridge, 424 F.2d 951, 964 (6th Cir. 1970); United States v. Mayes, 512 F.2d 637, 642 (6th Cir. 1975).

This distortion of Hyde appears most often in the context of a withdrawal defense to a conspiracy charge. In United States v. Read, 658 F.2d 1225 (7th Cir. 1981), the court considered the allocation of the burden of proof where a withdrawal defense was asserted. The case law of the circuit placed the burden squarely on the accused, setting up a presumption of a continuing conspiracy. In tracing the authority for this proposition, the court found, as in this case, that all roads lead to Hyde.

Upon re-examining Hyde, the court in Read found that "[t]he withdrawal

rule is based on a misinterpretation of Hyde" 658 F.2d at 1236. The court, therefore, overruled those cases imposing the burden of proving withdrawal on the accused and held that "it [withdrawal] must be disproved beyond a reasonable doubt by the government"* Id. Parenthetically, the withdrawal defense in Read was asserted by one conspirator, where the continuing conspiracy was amply evidenced by overt acts committed within the statute of limitations period.

In the instant case, the circuit court has seized upon the distorted language eschewed by Read to impose a presumption, not against the withdrawal of a single conspirator from a proven ongoing conspiracy, but in favor of the continuation of the alleged

*The defendant still has the burden of going forward with evidence of withdrawal.

conspiracy itself. The court of appeals has thus taken a catchy misstatement of Hyde's holding regarding the withdrawal of one conspirator from a continuing conspiracy and applied it to an essential element of the larger crime -- the very existence of the conspiracy during the time period not barred by the statute of limitations.

The Constitution requires that the government prove beyond a reasonable doubt every element of the offense charged. This constitutionally mandated requirement cannot be met by a judicial presumption, based not on the sound reasoning of Hyde v. United States, but on the enlarged and distorted shadow that case has cast through the decades, that a conspiracy continues to exist, without proof, until the accused has affirmatively shown its termination.

In addition, the holding in Hyde

itself should be re-examined. We are particularly concerned with the Court's reasoning that if one ever becomes a member of a continuing conspiracy he "necessarily" remains a member during the entire life of the conspiracy. In the words of Mr. Justice McKenna, speaking for five members of the Court:

Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue, it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time, he remains an agent during all of the former time. This view does not, as it is contended, take the defense of the statute of limitations from conspiracies. It allows it to all, but makes its application different.

225 U.S. at 369 (emphasis added).

This reasoning presumes guilt without requiring proof. It is at odds with more recent cases of this court such as Winship, Mullaney, Patterson and Sandstrom. It not only defies Due Process of law, it also undermines the Fifth Amendment privilege against self-incrimination. As observed, almost gleefully, in one of the cases relied upon by the court below, "strict" affirmative defenses that a conspiracy had been abandoned or that a conspirator had withdrawn are "most difficult for them to prove when, as here, the defendants exercised their right not to testify." United States v. Hamilton, 689 F.2d 1262, 1269 (6th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 753, 74 L.Ed.2d 971 (1983).

The reasoning in Hyde also appears at odds with this Court's earlier

decision in Kissel. Although Kissel had nothing to say about how or by whom continuation of the conspiracy must be proven, it did say that a continuing conspiracy requires "the continuous co-operation of the conspirators to keep it up" and "continue[d] . . . efforts in pursuance of the plan." In the words of Mr. Justice Holmes, speaking for all the members of the Court,

It is also true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irvine, 98 U.S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contem-

plates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success.

218 U.S. at 607-08 (emphasis added).

Kissel, of course, focuses on the continuance of the conspiracy itself and not just the continuance of an individual conspirator's membership in the conspiracy, the issue addressed in Hyde. But the life of conspiracy is also the issue in the present case. Moreover, the basic constitutional issues are the same in Kissel and Hyde. Finally, the lower courts have largely forgotten the language in Kissel and extended the language in Hyde to cover the duration of the entire conspiracy. This development in the law is all the more remarkable in that Hyde dealt with the general conspiracy statute in which an

overt act is required as an essential element, see Fiswick v. United States, 329 U.S. 211, 216 & n.4 (1946), whereas Kissel dealt with the Sherman Act in which no overt act must be pleaded or proved as an essential element of the crime.*

The reasoning in Hyde and its progeny appears at war with the statute of limitations as well. The applicable general statute of limitations commands that "no person shall be prosecuted . . . for any offense . . . unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U.S.C. § 3282 (emphasis added.) The RICO offense in question requires an agreement by

*Even more remarkable is the citation of Kissel by the court below for the proposition that "[t]he conspiracy may be deemed to continue so long as its purposes have neither been abandoned nor accomplished." 719 F.2d at 1124.

persons employed by or associated with an enterprise to conduct or participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c) and (d). "Racketeering activity" is defined to mean "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1954 (relating to unlawful welfare fund payments)" 18 U.S.C. § 1961(1)(B) (emphasis added.) "Pattern of racketeering activity" is defined to require "at least two acts of racketeering activity" which must have "occurred" in certain time frames. 18 U.S.C. § 1961(5) (emphasis added.) And, as the Magistrate pointed out below, the Congress deleted a subsection (e) from the proposed RICO legislation which would have provided as follows:

A violation of this section shall be deemed to continue so long as the person who committed the violation continues to receive any benefits from the violation. S. Rep. 91-617 (1969)

(App. 40).

Thus, the statute of limitations would seem to require an act or some other conduct to have been committed or to have actually occurred within the time period set by the law in order to manifest that the agreement was still alive and, hence, that something blameworthy was still going on. The statute of limitations would seem to prohibit the doctrine of continuing offenses to be applied to RICO conspiracy in such a fashion as to allow the very existence of the conspiracy to be "deemed to continue," 719 F.2d at 1124, and "presumed to exist," 719 F.2d at 1125, unless the accused proves the contrary. See United States v.

Borelli, 336 F.2d 376 (2d Cir. 1964) (before the issue of withdrawal as an affirmative defense is even reached, "the Government must present evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into which a defendant entered continued into the period not barred by limitation."); Toussie v. United States, 397 U.S. 112, 114-15 (1970).

In sum, the decision below is in conflict with basic principles and important language in decisions of this Court. Moreover, there is a conflict among the circuits, most courts having been seduced by the presumption attributed to Hyde. Only the Seventh Circuit has read that case so as to impose the burden of proof upon the prosecution. United States v. Read,

658 F.2d 1225 (7th Cir. 1981).^{*} Finally, the significance of the statute of limitations, the nearly universal inclusion of conspiracy charges by federal prosecutors and the recent proliferation of RICO charges all make the problems we have identified important, recurring questions of federal law. Certiorari should be granted.

^{*}No other Circuit has yet followed Read's analysis, and most of the Circuits prior to Read are contra. See, e.g., United States v. Stromberg, 268 F.2d 256 (2d Cir. 1959); United States v. Chester, 467 F.2d 53 (3d Cir.), cert. denied, 394 U.S. 1020 (1969); United States v. Blackshire, 538 F.2d 569 (4th Cir. 1976), cert. denied 429 U.S. 840 (1977); United States v. Pearson, 508 F.2d 595 (5th Cir.), cert. denied, 419 U.S. 1013 (1975) (binding on 11th Circuit); United States v. Mayes, 512 F.2d 637 (6th Cir. 1975); United States v. Boyd, 610 F.2d 521 (8th Cir. 1979), cert. denied, 444 U.S. 1089 (1980); United States v. Basey, 613 F.2d 198 (9th Cir. 1979), cert. denied, 446 U.S. 919 (1980); United States v. Parnell, 581 F.2d 1374 (10th Cir. 1978), cert. denied, 439 U.S. 1076 (1979).

III.

THIS COURT SHOULD ADOPT FOR THE FEDERAL COURTS THE MAJORITY RULE WHICH REQUIRES THAT AN INDICTMENT BE DISMISSED WHEN IT DOES NOT ALLEGE FACTS SHOWING THAT THE ALLEGED CRIMINAL ACT IS NOT BARRED BY THE STATUTE OF LIMITATIONS

The court of appeals held that "the indictment on its face satisfied the statute of limitations." 719 F.2d at 1125 (emphasis added). Since that court did not challenge the district court's ruling that overt act 28 was not in furtherance of the conspiracy, 719 F.2d at 1123, it must have relied upon the conclusory language commencing paragraph 3 of the indictment: "From in or about 1973, and continuously, thereafter at least until in or about December 1977" (App. A-1). Such language does not satisfy modern standards of criminal pleading. Rather, reliance on it represents adherence to the minority

rule by many federal courts even after the passage of the Federal Rules of Criminal Procedure. This Court should grant certiorari and bring the federal courts into the 20th century by adopting the majority rule.

A. The Majority Rule.

The majority rule at common law and in modern pleading practice is that an indictment must allege facts that show it is not barred by the statute of limitations. E.g., People v. Zamora, 18 Cal. 3d 538, 134 Cal. Rptr. 784, 557 P.2d 75, 92-93 n.26 (1976); Bustamante v. District Court, 138 Cal. 97, 329 P.2d 1013, 1016 (1958); 4 Wharton, Criminal Law and Procedure § 1776 at 584 (R. A. Anderson 12th ed. 1957); Joyce, Indictments § 387 at 432 (2d. ed. 1924); Bishop, New Criminal Procedure § 405 at 334-35 (2d. ed.

1913); see United States v. Laut, 17 F.R.D. 31 (S.D.N.Y. 1955); United States v. Gammill, 421 F.2d 185 (10th Cir. 1970); United States v. Benten and Co., Inc., 345 F. Supp. 1101 (M.D. Fla. 1972). Petitioners urged this rule to the court of appeals.

Some of the federal cases cited in the government's brief below either adopted or reflected the thinking of the minority view. They either stated or suggested that a federal indictment is not required to plead facts which show the crime occurred within the statute of limitations. E.g., United States v. Cook, 84 U.S. (17 Wall.) 168 (1872); United States v. Kissell, 218 U.S. 601 (1910).

These cases predate the Federal Rules of Criminal Procedure. Often their holdings were framed by the technical regime of common-law pleading.

See Cook, 84 U.S. (17 Wall.) at 173-182 (limitations of demurrer construed to preclude the pre-trial adjudication of a statute of limitations defense). Still other cases relied upon by the government set forth conclusory statements and offer no analysis. These cases should not be relied upon because the minority view simply is inconsistent with the purposes and goals of the Federal Rules of Criminal Procedure, the limited resources of the federal courts, fairness to the defendants, a simple cost-benefit analysis, and therefore, is unacceptable.

B. The Majority Rule is Sound.

The Federal Rules of Criminal Procedure "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Fed. R. Crim. P. 2. They permit the accused

to move to dismiss a time-barred indictment, Fed. R. Crim. P. 12(a), and permit the pre-trial adjudication of the statute of limitations defense. Fed. R. Crim. P. 12(b). As many courts have noted, it simply makes sense to learn that an indictment is time-barred before a lengthy trial. (R.8:1332, n. 1; 11:5, 5-6); United States v. Haramic, 125 F. Supp. 128 (W.D. Pa. 1964).

A statute of limitations is a complete bar to the indictment. In general, it favors "repose", and, in particular, 18 U.S.C. § 3282 bars untimely "prosecutions," and extinguishes the power of the court to entertain time-barred prosecutions. These policies demand the earliest resolution of the statute of limitations defense. Accordingly, the limited resources of the courts and fairness to the Defendants demand the earliest

resolution of the statute of limitations defense. The majority rule evokes the adage "an ounce of prevention is worth a pound of cure."

The indictment must plead the occurrence of an overt act in furtherance of the conspiracy, or similar facts manifesting that the conspiracy is alive, committed within five years of the return of the indictment. If the conspiracy is to be deemed living -- despite the absence of any signs of life -- by the employment of some presumption, then the presumption should at least be pleaded.

When the indictment issues, the government is the accuser. It has the burden of proof and it has superior knowledge. If the government can allege the occurrence of an act in furtherance of the conspiracy within the statute of limitations period, justice,

fairness and efficiency require it to do so. The costs of such a pleading requirement are virtually zero. The potential savings to the parties, to the courts and to the public could be enormous. If the government cannot adequately make such an allegation, then there should be no indictment.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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